No. 02-1712

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMY SHEPARD,

Plaintiff-Appellant

UNITED STATES OF AMERICA,

Intervenor

v.

KATRINA IRVING, GIRHARD MULHERIN, ALAN MERTEN, THE RECTORS AND VISITORS OF GEORGE MASON UNIVERSITY, LISA STIDHAM, LEIGH ANN MURTHA, CHRISSY FORBES, JOE BOATWRIGHT, and NIKKIA ANDERSON,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS INTERVENOR

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STATEMENT OF JURISDICTION

The United States concurs with Plaintiff's statement of jurisdiction.

STATEMENT OF THE ISSUES

The United States will address the following question:

Whether conditioning the receipt of federal financial assistance on waiver of States' Eleventh Amendment immunity for suits under Section 504 of the Rehabilitation Act, 29 U.S.C. 794, is a valid exercise of Congress's authority under the Spending Clause.[1]

STATEMENT OF THE CASE

1. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, contains an "antidiscrimination mandate" that was enacted to "enlist[] all programs receiving federal funds" in Congress's attempt to eliminate discrimination against individuals with disabilities. *School Bd. of Nassau County* v. *Arline*, 480 U.S.

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[1] The United States originally intervened in this case also to defend the constitutionality of the abrogation provision in the Americans with Disabilities Act, 42 U.S.C. 12202, (ADA) as applied to claims under Title II of the Act. However, this Court recently held that this abrogation is invalid. See *Wessel* v. *Glendening*, No. 00-6634, 2002 WL 31121398 (4th Cir. Sept. 26, 2002). In any case, because Plaintiff is entitled to the same relief under either Title II of the ADA or Section 504, and because the University has waived immunity to Section 504 claims (see pp. 6-32 *infra*), this Court need not address the University's Title II challenge in this case. See *Litman* v. *George Mason Univ.*, 186 F.3d 544, 549 (4th Cir. 1999) (deciding whether State waived immunity before considering constitutionality of abrogation), cert. denied, 528 U.S. 1181 (2000). For the same reason, this Court need not resolve the University's contention (Br. 23-24) that Congress lacks the power to abrogate States' immunity Section 504 claims (as opposed to requiring States to waive immunity to such claims in order to receive federal funds). *Ibid*.

273, 286 n.15, 277 (1987). Congress found that "individuals with disabilities constitute one of the most disadvantaged groups in society," and that they "continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services." 29 U.S.C. 701(a)(2) & (a)(5).

In order to eliminate that discrimination in programs receiving federal financial assistance, Congress enacted Section 504, which provides that "[n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a). A "program or activity" is defined to include "all of the operations" of a state agency, university, or public system of higher education "any part of which is extended Federal financial assistance." 29 U.S.C. 794(b). Protections under Section 504 are limited to "otherwise qualified" individuals, that is those persons who can meet the "essential" eligibility requirements of the relevant program or activity, with or without "reasonable accommodation[s]." *Arline*, 480 U.S. at 287 n.17. An accommodation is not reasonable if it either imposes "undue financial and

administrative burdens" on the grantee or requires "a fundamental alteration in the nature of [the] program." *Ibid*. Section 504 may be enforced through private suits against programs or activities receiving federal funds. See *Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 827-828 (4th Cir. 1994). Congress expressly conditioned receipt of federal funds on waiver of the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 2000d-7.

2. Appellant filed suit against George Mason University and various University officials (University), asserting, among other things, claims under Section 504 and the Americans With Disabilities Act, 42 U.S.C. 12101 *et seq*. The district court dismissed the complaint. See *Shepard* v. *Irving*, 204 F. Supp. 2d 902, 915 (E.D. Va. 2002). The court held that Congress lacked the authority to abrogate the University's sovereign immunity[2] to damages claims under Title II of the ADA, although Plaintiff could still sue University officials for injunctive relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). See 204 F. Supp. 2d at 915, 919-920. The court further held that the University had waived its immunity to Plaintiff's Section 504 claims by accepting federal funds conditioned on a waiver of immunity to such claims. *Id*. at 916. In so doing, the district court

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[2] George Mason University is a state university entitled to sovereign immunity under the Eleventh Amendment. See *Litman*, 186 F.3d at 547. The University acknowledges (Br. 5) that it receives federal funds and is subject to Section 504.

rejected the University's assertion that the waiver was not knowing and was unconstitutionally coerced. *Id*. at 916-919. Ultimately, however, the district court concluded that Plaintiff failed to state a claim under either Title II or Section 504. *Id*. at 926.

SUMMARY OF ARGUMENT

The Eleventh Amendment is no bar to Plaintiff's claims under Section 504 of the Rehabilitation Act. As the University concedes (Br. 24), by enacting 42 U.S.C. 2000d-7, Congress put state agencies on clear notice that acceptance of federal financial assistance was conditioned on a waiver of their Eleventh Amendment immunity to discrimination suits under Section 504. By accepting the funds, a state agency agrees to that term. Both this Court and the Supreme Court have made clear that Congress may condition receipt of federal funds on a waiver of a State's sovereign immunity. The University's decision to agree to this term, and accept federal funds, was not coerced. Moreover, the conditions attached to federal funds by Section 504 are directly related to Congress's important interest in ensuring that the benefits of programs funded through federal tax dollars are not denied to individuals with disabilities on the basis of their disabilities and that federal funding is not used to support such discriminatory practices.

ARGUMENT

CONGRESS VALIDLY CONDITIONED FEDERAL FUNDING ON A WAIVER OF ELEVENTH AMENDMENT IMMUNITY FOR PRIVATE CLAIMS UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973

Section 2000d-7 of Title 42 provides that a "State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 * * * [and] title VI of the Civil Rights Act of 1964." In *Litman* v. *George Mason University*, 186 F.3d 544 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000), this Court held that Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause, Art. I, § 8, Cl. 1, to prescribe conditions for States that voluntarily accept federal financial assistance. Thus, the University, by accepting federal financial assistance, has waived its Eleventh Amendment immunity to Section 504 claims.

A. Congress Has The Authority To Condition The Receipt Of Federal Financial Assistance On The State Waiving Its Eleventh Amendment Immunity

The University argues (Br. 25-32) that the waiver requirement in 42 U.S.C. 2000d-7 is unconstitutional because Congress may not, under the Spending Clause, require a State to waive its immunity in exchange for federal funding. Based on clear authority from the Supreme Court, this Court rejected the same

argument, made by the same university, in *Litman*. That decision is correct, is consistent with the decisions of every other court of appeals,[3] and has not been undermined by subsequent Supreme Court cases.

1. The Constitution Does Not Prohibit Congress From Using Its Spending Clause Authority To Offer Federal Financial Assistance In Exchange For State Waivers Of Immunity

In *South Dakota* v. *Dole*, 483 U.S. 203 (1987), Congress required States receiving federal highway funds to raise their minimum drinking age to 21. The State of South Dakota sued the United States, arguing that this condition was invalid because the Twenty-first Amendment reserved the authority to regulate alcohol to the States. The State contended that "'Congress may not use the spending power to regulate that which it is prohibited from regulating directly

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[3] See *Garcia* v. *SUNY Health Sciences Ctr.*, 280 F.3d 98, 113 (2d Cir. 2001) ("Congress may require as a condition of accepting [federal] funds that a state agree to waive its sovereign immunity."); *Arecibo Comm. Health Care, Inc.* v. *Puerto Rico*, 270 F.3d 17, 24-25 (1st Cir. 2001) (same); *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002) (same); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2001) (same); *Nihiser* v. *Ohio E.P.A.,* 269 F.3d 626, 628 (6th Cir. 2001) (same), cert. denied, 122 S.Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000) (same); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc) (same), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 819, opinion amended, 271 F.3d 910 (9th Cir. 2001) (same), cert. denied, 122 S.Ct. 2591 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002) (same); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999) (same), rev'd on other grounds, 532 U.S. 275 (2001).

under the Twenty-first Amendment.'" *Id*. at 209 (citation omitted). The Supreme Court rejected this claim, holding that even if the Twenty-first Amendment prohibited Congress from directly regulating drinking ages, Congress still had the power to place conditions relating to drinking ages on the receipt of federal transportation funds. *Id*. at 206. The Court explained that "objectives not thought to be within" Congress's power to regulate directly "may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." *Id*. at 207. Thus, there is no "prohibition on the indirect achievement of objectives which Congress is not empowered to achieve directly." *Id*. at 210.

This Court, in *Litman,* applied these principles to the waiver of sovereign immunity required by Section 2000d-7. As in this case, George Mason University was the defendant, and conceded that it had accepted federal funds. Therefore, pursuant to Section 2000d-7, the University waived immunity for claims under Title IX (as well as claims under Section 504). As it has again in this case, the University challenged Congress's power to require the waiver in exchange for federal funds. The district court rejected that argument, holding that

> while Congress does not have the authority pursuant to its Article I powers to simply *abrogate* the States' Eleventh Amendment immunity, Congress does have the power to require the States to *waive* their immunity pursuant to a valid exercise of its spending power. * * * [T]he Eleventh Amendment

> presented no independent constitutional bar to Congress' employing its spending power in this manner.

Id. at 548 (citations and quotation marks omitted). On appeal, this Court agreed. See *id*. at 554-555. In particular, this Court held that Congress's power under the Spending Clause "extended beyond the original enumerations of congressional power granted by the Constitution," so that "conditioning federal funds on an unambiguous waiver of a state's Eleventh Amendment immunity is as permissible as a state's direct waiver of such immunity." *Ibid*. Accordingly, this Court held, Section 2000d-7 is a valid exercise of Congress's Spending Power and by accepting federal funds, the University waived immunity to claims identified in that provision. *Id*. at 555.

In this appeal, the University acknowledges (Br. 42) that it is raising the same argument it made, and lost, in *Litman*. It simply insists (Br. 42) that the Court's "determination should be revisited" because, in the University's view (Br. 25-29), *Litman* conflicts with the best reading of *College Savings Bank* v. *Florida Prepaid Postsecondary Educational Expense Board*, 527 U.S. 666 (1999). But this Court fully considered the implications of *College Savings Bank* in deciding *Litman* and found that it supported the conclusion that "Congress, in legislating under the Spending Clause, can condition a waiver of sovereign immunity upon

the states' acceptance of a federal grant." 186 F.3d at 555. The University concedes (Br. 25) that *College Savings Bank* can be read to support this Court's interpretation. But it insists that the case is "ambiguous" (Br. 25) and that the *Litman* panel did not "attempt to reconcile the apparently contradictory passages within it" (Br. 42). But these are not grounds that would allow this panel to revisit the *Litman* decision. See, *e.g.*, *Etheridge* v. *Norfolk & Western Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court.") (citation and quotation marks omitted).[4]

In any case, *College Savings Bank* creates no ambiguity relevant to this case and firmly supports the *Litman* holding. The question in *College Savings Bank* was whether Congress could condition a State's right to engage in certain forms of interstate commerce on its waiving Eleventh Amendment immunity to suits under

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[4] The University also asserts (Br. 42) that subsequent Supreme Court cases "all reinforce, at least implicitly, the idea that the preservation of the State's sovereign immunity is critical to the Constitution's structure." But the *Litman* panel was fully aware of the constitutional importance of sovereign immunity. See, *e.g.*, 186 F.3d at 549. In any case, that panel's decision cannot be disregarded simply because subsequent Supreme Court cases "implicitly" "reinforce" an argument rejected by that panel. See *Etheridge,* 9 F.3d at 1090 (requiring that panel decision be "overruled by a * * * superseding contrary decision of the Supreme Court") (citation omitted).

the Trademark Act, 15 U.S.C. 1125(a). The Court held that it could not, overruling *Parden* v. *Terminal Railway*, 377 U.S. 184 (1964). See 527 U.S. at 676-687. Prohibiting a State from engaging in interstate commerce for the sole purpose of extracting a waiver of immunity, the Court concluded, "is little more than abrogation under another name." 527 U.S. at 684. However, the Court specifically distinguished the illegitimate extraction of a waiver previously permitted by *Parden* from two well-established circumstances under which Congress may, pursuant to its Article I powers, require States to waive immunity in exchange for federal benefits. First, the Court reaffirmed the holding of *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that Congress could exercise its powers under Article I, Section 10, to require States to waive their Eleventh Amendment immunity from suit in exchange for Congress's approval of an interstate compact. See 527 U.S. at 686. Second, the Court made clear that nothing in its opinion undermined the settled law that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *Ibid*. (citing *Dole*, 483 U.S. 203). Thus, the Court reaffirmed that "a waiver [of immunity] may be found in a State's acceptance of a federal grant." *Id*. at 678 n.2. As this Court

found in *Litman*, this second exception applies to the waiver of immunity required by Section 2000d-7. See 186 F.3d at 555.

The University argues (Br. 27-29) that the "constructive waiver" prohibited by *College Savings Bank* cannot be sensibly distinguished from a waiver required in exchange for federal funds. The dissent in *College Savings Bank* agreed. 527 U.S. at 696-697 (Breyer, J., dissenting). However, the majority rejected that view:

> These cases seem to us fundamentally different from the present one. * * * Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts. In the present case, however, what Congress threatens if the State refuses to agree to its condition is not the denial of a gift or a gratuity, but a sanction: exclusion of the State from otherwise permissible activity.

527 U.S. at 686-687. Whether or not the University finds this distinction satisfying, this Court has no authority to disregard it.

Observing that distinction, and allowing States to waive their immunity in exchange for federal funding, is not inconsistent with the importance of sovereign immunity to the "structure of the American constitutional system" (Br. 31), nor does it permit "Congress [to] use its Spending Clause power to overturn *Seminole Tribe*, *Florida Prepaid College Savings Bank*, *Kimel*, and *Garrett I*" (Br. 27). *Seminole Tribe* and its progeny recognize that State sovereignty is not violated by enforcing a State's decision to waive its immunity, either in an individual case or

in a class of cases. See, *e.g.*, *Alden* v. *Maine*, 527 U.S. 706, 755 (1999); *College Sav. Bank*, 527 U.S. at 675-676. The holding of *Seminole Tribe* is respected, not overturned, when States' amenability to suit is determined by the State's own choices rather than through the unilateral action of Congress. And when States choose to waive their immunity in exchange for federal financial assistance, "[r]equiring States to honor the obligations voluntarily assumed as a condition of federal funding * * * simply does not intrude on their sovereignty." *Bell* v. *New Jersey*, 461 U.S. 773, 790 (1983). See also *Bell Atl. Md., Inc.* v. *MCI Worldcom, Inc.*, 240 F.3d 279, 289 (4th Cir. 2001) ("[N]othing in the federal structure prohibits a State from voluntarily waiving its sovereign immunity from suit by private individuals either by explicitly consenting to such suits, or by accepting from Congress a gift or gratuity that is conditioned on such a waiver.") (citations omitted), vacated on other grounds, 122 S.Ct. 1753 (2002).

2. Conditioning Receipt Of Federal Funds On A Waiver Of Immunity Does Not Violate The "Unconstitutional Conditions" Doctrine

The University further argues (Br. 31-32) that the doctrine of "unconstitutional conditions" prohibits Congress from ever requiring a State to "give up a constitutional right" (*i.e.*, Eleventh Amendment immunity) in exchange for a federal benefit. This argument is precluded by *Litman* and is meritless

besides. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 174 (3d Cir. 2002) (rejecting "unconstitutional conditions" argument).

The University's "unconstitutional conditions" argument is, in substance, no different than the argument it made, and this Court rejected, under a different label in *Litman*. Compare *Litman*, 186 F.3d at 554 ("GMU's second argument, that Congress cannot employ its spending power in a manner that conditions a state's receipt of funding upon a waiver of Eleventh Amendment immunity, is also without merit under current Supreme Court jurisprudence.") with Br. 32 (under "unconstitutional conditions" doctrine, "Congress may not require the surrender of the States' sovereignty as a condition of receiving a benefit from the National Government."). This panel is bound by *Litman*'s resolution of that argument.

Even if the "unconstitutional conditions" argument were a new and distinct argument, the reasons this Court gave for rejecting the University's position in *Litman* require rejection of the "unconstitutional conditions" argument as well. As the *Litman* Court observed, see 186 F.3d at 554-555, the Supreme Court has repeatedly affirmed Congress's authority to condition States' receipt of federal funds on acceptance of federal conditions, including the waiver of Eleventh Amendment immunity. In *College Savings Bank*, the Court specifically agreed that "'a waiver [of immunity] may be found in a State's acceptance of a federal

grant.'" 527 U.S. at 678 n.2 (citation omitted). The Court further made clear that its recent sovereign immunity cases did nothing to undermine well-settled authority that had previously allowed Congress to condition federal "gifts," such as federal financial assistance, on a State's waiver of sovereign immunity. See 527 U.S. at 686-687

The University's argument suggests (Br. 31) that these cases were wrongly decided because they violate what it portrays as a clear, universal and simple rule: "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government" (Br. 31 (quoting *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 (1994)). This suggestion is misleading in several respects,[5] not the least of which is the University's selective

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[5] The "unconstitutional conditions" doctrine is neither universal nor simple. It is a doctrine that "for over a hundred years has bedeviled courts and commentators alike." Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv. L. Rev. 4, 6 (1988). The doctrine does not prohibit the government from offering inducements in exchange for the waiver of constitutional rights in all cases, as *Dole* itself demonstrates. See also, *e.g.*, *Rust* v. *Sullivan*, 500 U.S. 173 (1991) (federal government may condition federal family planning funds on program participants' waiver of right to discuss abortion with program clients); *Connick* v. *Myers*, 461 U.S. 138 (1983) (government may condition employment on limitation of employees' free speech rights); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (per curiam) (federal government may condition federal money to candidates who comply with spending limits even if First Amendment protects right to spend unlimited amounts on campaign); *Wyman* v. *James*, 400 U.S. 309, 317-318 (1971) (State may condition welfare benefits on individual's

(continued...)

quotation of *Dolan*. What the Court said, in full, was:

> Under the well-settled doctrine of "unconstitutional conditions," the government may not require a person to give up a constitutional right – here the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government *where the benefit sought has little or no relationship to the property.*

512 U.S. at 385 (emphasis added). The Court then went on to explain that the "unconstitutional conditions" doctrine permits the government to require the relinquishment of property without just compensation in exchange for a zoning variance, so long as there is an "essential nexus" between a "'legitimate state interest' and the permit condition exacted by the city," and a "rough proportionality" between the permit condition and the impact of the proposed development. *Id*. at 512 U.S. at 386, 390-391. As this description makes clear, the "unconstitutional conditions doctrine" is neither a complete prohibition on requiring a waiver of constitutional rights in return for government benefits,[6] nor

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[5](...continued)
consent to inspection of home without probable cause); *Phan* v. *Virginia*, 806 F.2d 516, 520 (4th Cir. 1986) (First Amendment unconstitutional conditions cases require "an unconscionable dilemma created by the state"). Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 Geo. L.J. 1, 3 (2001) ("[I]t is now universally recognized that such conditional offers are sometimes constitutionally permissible and sometimes not.").

[6] In fact, the "unconstitutional conditions" doctrine has not been applied to the

(continued...)

is it a rule capable of a single, universal statement. Instead, the principles behind the doctrine have generated different limitations on conditional offers of government assistance depending on the constitutional rights involved and the factual context.[7]

As discussed below, in the context of conditions imposed on States' receipt of federal financial assistance, the principles underlying the "unconstitutional conditions" doctrine are given effect through a series of limitations imposed on Congress's Spending Clause authority. Subject to these limitations, however, Congress is not prohibited from requiring a State to waive immunity in order to receive federal funds. See *Litman*, 186 F.3d at 554-555.

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[6](...continued)
relations between co-sovereigns. See *Koslow*, 302 F.3d at 174. Instead, the doctrine was developed in light of the potentially coercive relationship between a government and individual citizens dependent on certain government "privileges" for daily living. See *ibid*. (citing *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926)). The relationship between sovereigns is of a different nature, and States are protected against federal coercion by other doctrines. See *New York* v. *United States*, 505 U.S. 144 (1992); *Koslow*, 302 F.3d at 174. Thus, it is no coincidence that the University is unable to cite any case applying the "unconstitutional conditions" doctrine to the relationship between States and the federal government.

[7] Compare, *e.g.*, *F.C.C.* v. *League of Women Voters*, 468 U.S. 364 (1984) (conditions on speech in exchange for broadcast licenses) with *Connick* v. *Myers*, 461 U.S. 138 (1983) (conditions on speech in exchange for public employment). See generally Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

B. Section 504 Is Valid Spending Clause Legislation

The University argues (Br. 33-42) that even if Congress generally may condition receipt of federal funds on a waiver of a State's sovereign immunity, Section 504 nonetheless does not satisfy the Supreme Court's tests for valid Spending Clause Legislation. In *West Virginia* v. *United States Department of Health & Human Services*, 289 F.3d 281 (4th Cir. 2002), this Court identified five constitutional limitations on Congress's Spending Power. First, the Spending Clause by its terms requires that Congress legislate in pursuit of "the general welfare." *Id*. at 286. Second, any conditions on the receipt of federal funds must be "unambiguous." *Ibid*. Third, "any conditions imposed must be reasonably related to the purpose of expenditure." *Ibid*. Fourth, the conditions must not violate any "independent constitutional prohibition." *Ibid*. And fifth, the inducement must not be unconstitutionally coercive. *Ibid*.

The University relies on only two of the limitations here,[8] arguing (Br. 33-38) that the State was coerced into accepting Section 504's conditions and (Br. 38-41) that those conditions are insufficiently related to the federal funds to which

[8] In *Litman*, the University argued unsuccessfully that Section 2000d-7 was ambiguous. See 186 F.3d at 551-554. However, the University did not raise its present coercion and relatedness objections.

they are attached. Neither claim has any merit and both have been rejected by the three courts of appeals that have previously considered similar arguments.[9]

1. The Required Waiver Is Not Unconstitutionally Coercive

The University argues (Br. 37) that unconstitutional coercion occurs whenever a state agency is given the choice "to waive sovereign immunity or lose all federal funds." This Court rejected a similar assertion in *West Virginia* v. *United States Department of Health & Human Services*, 289 F.3d 281 (4th Cir. 2002), on the ground that the a threat to withdraw all *or part* of West Virginia's Medicaid funding was not unconstitutionally coercive. There is no basis for a different conclusion here, where any amounts for which the Defendants may be liable are far less than the total federal funding for their programs.

In *West Virginia*, the State sought a declaration that it was not obliged to comply with a particular Medicaid funding condition because its agreement to that condition had been unconstitutionally coerced. See 289 F.3d at 286. That condition required the State to implement a program to recover certain costs from the estates of deceased Medicaid recipients. *Id*. at 284-285. The State's coercion

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[9] See *Lovell* v. *Chandler*, 303 F.3d 1039, 1051 (9th Cir. 2002) (rejecting coercion and "relatedness" challenges to Section 504), petition for cert. pending, No. 02-545; *Koslow*, 302 F.3d at 172 n.11, 173-176 (same); *Jim C.*, 235 F.3d 1081-1082 (same).

argument "center[ed] on its assertion that the federal government would withhold *all* of West Virginia's federal Medicaid funds unless West Virginia implemented an estate recovery program." *Id*. at 291 (emphasis in original). In particular, the State argued that unconstitutional coercion was created by the threatened loss of more than $1 billion in Medicaid funds, *id*. at 285, upon which the State was "unusually dependent" and without which "West Virginia's health care system would effectively collapse." *Id*. at 287.[10] In contrast, the State recovered approximately $2.5 million per year from the estate recovery program. *Ibid*. West Virginia argued that the threatened penalty of one billion dollars was so disproportionate to the effect of its breach of the funding conditions that it must be coercive. *Id*. at 291. At the time of suit, however, the federal government was not actually attempting to withhold any Medicaid funds; the State simply wanted a declaration that it did not have to comply with the estate recovery condition. Accordingly, the question before the Court was "whether Congress' requirement that states participating in the Medicaid program implement the estate recovery provisions or lose all or part of their [funding] is impermissible coercive and thus

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[10] The State also argued that "Congress ha[s] consumed a disproportionate share of the available tax base" and therefore "West Virginia cannot realistically replace lost Medicaid funds by increasing taxes on its citizens." *Id*. at 287 & n.5 (quoting State's brief).

violates the Tenth Amendment." *Id*. at 292. This Court answered that question "in the negative," finding that the "small difference in language" between potentially losing "all" and "part" of the federal funding "makes all the difference in our analysis." *Ibid*.

The Court began its analysis by noting that "the coercion theory is somewhat amorphous and cannot easily be reduced to a neat set of black-letter rules of application." *Id*. at 288. The opinion noted that "the Supreme Court since 1937 has not struck down a Congressional exercise of its spending powers" and that although the Court "has more than once referred to the existence of the coercion theory," "its cases have provided little guidance for determining when the line between encouragement and coercion is crossed." *Ibid*.

Nonetheless, this Court recognized that the Supreme Court *had* repeatedly made clear that courts should not readily undertake to strike down a federal spending statute on coercion grounds. See *id*. at 289-290. Thus, while the Supreme Court in *Dole* recognized that the financial inducement of federal funds "might be so coercive as to pass the point at which 'pressure turns into compulsion,'" 483 U.S. at 211 (quoting *Steward Mach. Co.* v. *Davis*, 301 U.S.

548, 590 (1937)), it also cautioned that every congressional spending statute "is in some measure a temptation." *Ibid*. "[T]o hold that motive or temptation is equivalent to coercion," the Court warned, "is to plunge the law in endless difficulties." *Ibid*. In the case before it, the Court found that the withholding of 5% of highway funds a "relatively mild encouragement." *Ibid*. In *West Virginia*, this Court noted that "we are aware of no decision from any court finding a conditional grant to be impermissibly coercive." 289 F.3d at 289.

Turning to West Virginia's claim, this Court rejected the assertion that the State's agreement to implement an estate recovery program was coerced simply because Congress required the agreement before the State could receive any Medicaid funds. *Id*. at 294. The Court held open the possibility that "serious Tenth Amendment questions would be raised" if the federal government attempted to withhold "the entirety of a substantial federal grant because of an insubstantial failing by the state." *Id*. at 291-292. That possibility had been raised in *Virginia Department of Education* v. *Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), when the federal government attempted to withhold the State of Virginia's allotment of funds under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, for non-compliance with a certain regulation. As this Court explained in *West Virginia*, see 289 F.3d at 290-291, the majority of the en banc

Court in *Riley* held that the regulation was invalid, but five members of the court also joined an opinion by Judge Luttig which concluded, albeit in dicta, that enforcement of the regulation through the withholding of the State's entire IDEA allotment would raise serious Tenth Amendment questions. See *Riley*, 106 F.3d at 570. Judge Luttig's wrote that

> [I]f the Court meant what it said in *Dole*, then I would think that a Tenth Amendment claim of the highest order lies where * * * the Federal Government * * * withholds the entirety of a substantial federal grant on the ground that the States refuse to fulfill their federal obligation in some insubstantial respect rather than submit to the policy dictates of Washington in a matter peculiarly within their powers as sovereign States. In such a circumstance, the argument as to coercion is much more than rhetoric; it is an argument of fact. It is, as well, an argument that the Federal Government has, in an act more akin to forbidden regulation than to permissible condition, supplanted with its own policy preferences the considered judgments of the States as to how best to instill in their youth the sense of personal responsibility and related values essential for them to function in a free and civilized society. As such, it is an argument well-grounded in the Tenth Amendment's reservation "to the States respectively, or to the people" of those "powers not delegated to the United States by the Constitution, nor prohibited by it to the States."

Riley, 106 F.3d at 570 (citation omitted).

Similar Tenth Amendment questions, however, were not posed by West Virginia's suit, because the State was not seeking to resist a federal attempt to withhold all Medicaid funds, but instead was seeking to avoid having to comply with the funding condition at all. Accordingly, this Court held that to "the extent

that West Virginia contends its actions were coerced by the mere possibility that it could lose all of its federal funds, that argument is unavailing." *Id*. at 294.

The University's claim of coercion in this case is no more persuasive. Like the State of West Virginia, the University is required to agree to Section 504's nondiscrimination and enforcement provisions in order to receive federal funds. The University is certainly no more dependent on federal funding for its programs than West Virginia was for its Medicaid program. Compare Br. 34 (the University "receives approximately $44,183,959 or 13.8% of its total operating budget in federal funds") with *West Virginia*, 289 F.3d at 284 & n.2 (State received more than $1 billion in federal funds, representing approximately 75% of the State's Medicaid budget).[11] Moreover, this is not a case in which the University is

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[11] In any case, the Supreme Court has never held that the size of a federal grant, or a jurisdiction's decision to rely heavily on federal instead of state or local funding, could turn an unobjectionable offer of assistance into a coerced extraction of immunity. The concurrence in *Riley* specifically rejected this mode of analysis:

> The percentage of the total monies expended by the State * * * that is represented by the federal grant is irrelevant in assessing the coerciveness of the inducement, at least as it appears from the Court's opinion in *Dole*. Were it otherwise, the same federal grant in the same amount would be unconstitutionally coercive as to one State, but not as to another which expends a greater amount for the purposes served by the grant; indeed, were it otherwise, there would be created a perverse incentive for the States to spend less in areas in which they

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resisting an attempt by the federal government to "withhold[] the entirety of a substantial federal grant." *Id*. at 291 (quoting *Riley*, 106 F.3d at 570 (opinion of Luttig, J.)). It is, instead, a case seeking compensatory damages to redress the harm caused by the violation of a funding condition. There can be no question that this remedy is "proportionate to the breach" or that it is a remedy within the power of Congress to authorize. *Id.* at 292. See also *ibid*. (the possibility of a sanction less than the entire withholding of federal funds "saves [the statute] from * * * Tenth Amendment challenge"); accord *Riley*, 106 F.3d at 569.

This conclusion is consistent with the Supreme Court's treatment of similar requirements under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and other Spending Clause statutes. In *Lau* v. *Nichols*, 414 U.S. 563 (1974), the Court held that Title VI, which prohibits racial discrimination "under any program or activity receiving Federal financial assistance," and its implementing regulations, were within Congress's Spending Clause authority. The "Federal Government has power to fix the terms on which its money allotments to the States shall be disbursed. Whatever may be the limits of that power, they have not been reached

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[11](...continued)

> expected to receive federal monies, in order to render more vulnerable under the coercion theory any conditions that were imposed.

106 F.3d at 570.

here." 414 U.S. at 569 (citations omitted). This was true even though Title VI required covered entities to abide by nondiscrimination requirements and as a condition of receiving any federal funding. See 42 U.S.C. 2000d.[12] Section 504 is identical to Title VI in that respect. Compare 42 U.S.C 2000d (Title VI) with 29 U.S.C. 794(a) (Section 504).[13] Accepting the University's argument, thus, requires rejecting the Supreme Court's conclusion in *Lau*.[14]

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[12] In *Alexander* v. *Sandoval*, 532 U.S. 275, 285 (2001), the Court noted that it has "rejected Lau's interpretation of § 601 [of the Civil Rights Act of 1964, 42 U.S.C. 2000d] as reaching beyond intentional discrimination." However, the Court did not cast doubt on the Spending Clause holding in *Lau*.

[13] In fact, Section 504 and a number of other civil rights statutes, including Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), were explicitly patterned on Title VI. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 278 n.2 (1987). This Court rejected the University's Spending Clause objections to Title IX in *Litman*. See 186 F.3d at 557. See also *Grove City Coll.* v. *Bell*, 465 U.S. 555, 575 (1984) (Title IX's anti-discrimination conditions are not unconstitutional because "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.").

[14] The Court has found similarly unobjectionable other Spending Clause statutes that impose conditions on the receipt of any federal funding. See *Board of Educ.* v. *Mergens*, 496 U.S. 226, 241 (1990) (noting that because the Equal Access Act, 20 U.S.C. 4071 *et seq*., "applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this *may be an unrealistic option*, [complying with the Act] is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.") (emphasis added, citation omitted); *North Carolina ex*

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In the end, State officials are constantly forced to make difficult decisions regarding competing needs for limited funds. While it may not always be easy to decline federal funds, it remains true of Section 504 that if "the conditions imposed on the federal grant are repugnant to the state, the state may decline to accept the funds." *West Virginia*, 289 F.3d at 296. See also *ibid*. ("Very simply, to the extent the state finds the conditions attached by Congress distasteful, the state has available to it the simple expedient of refusing to yield to what it urges is 'federal coercion.'") (quoting *South Dakota* v. *Dole*, 791 F.2d 628, 634 (8th Cir. 1986), aff'd, 483 U.S. 203 (1987)).

2. Section 504's Nondiscrimination Requirements Are Sufficiently Related To The Objectives For Which The Funds Are Provided

The University argues (Br. 38-41) that Section 504 also violates the Supreme Court's "relatedness" requirement for Spending Clause legislation, or rather that it violates Justice O'Connor's understanding of that requirement expressed in her dissenting opinion in *Dole*. This argument is meritless. In distributing funds for the "general Welfare," Congress is well within its

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[14](...continued)
rel. Morrow v. *Califano*, 435 U.S. 962 (1978), aff'g, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court) (threat of exclusion from 40 federal spending programs unless State enacts particular legislation not "'coercive' in the constitutional sense").

constitutional rights to require that the benefits of those expenditures be enjoyed *generally*, without regard to disability, and that they not be used to subsidize discrimination by recipient agencies.

The majority opinion in *Dole* held that "conditions on federal grants might be illegitimate if they are unrelated" to the purposes of the federal funding. 483 U.S. at 207. In the case before it, the Court concluded that "one of the main purposes" of the grant was to promote "safe interstate travel." *Id*. at 208. Because underage drinking interfered with this goal, requiring States to raise their minimum drinking age was "reasonably calculated to address this particular impediment to a purpose for which the funds are expended." *Id*. at 209. This was enough to satisfy the majority's construction of the "relatedness" requirement. It was not enough, however, to satisfy Justice O'Connor. In her dissenting view, Congress's power under the Spending Clause should be limited to directing "how the money should be spent." *Id*. at 215-216. Because requiring States to raise their minimum drinking age did not direct how federal highway funds should be spent, Justice O'Connor would have held the statute unconstitutional. *Id*. at 218.

The University apparently concedes that Section 504 meets the "relatedness" requirement of the majority opinion in *Dole*, and makes no attempt to show that it does not. Instead, the University argues (Br. 40) that Section 504 is

not valid Spending Clause legislation "[u]nder Justice O'Connor's analytical framework" in her *Dole* dissent and (Br. 41) that her "view is the better interpretation of the Constitution and should be adopted by this Court." Although the majority in *Dole* did not undertake to define the "outer bounds of the 'germaneness' or 'relatedness' limitation," *id*. at 208 n.3, it clearly rejected Justice O'Connor's position that Congress was limited to directing how the funds could be spent, since the drinking age condition would fail that standard. And while the University is unwilling to acknowledge that Justice O'Connor's view failed to carry the day, Justice O'Connor herself has. In writing for the Court in *New York* v. *United States*, 505 U.S. 144 (1992), Justice O'Connor made clear that the constitutional standard requires only that the funding conditions "bear some relationship to the purpose of the federal spending," *id*. at 167, not that the conditions direct how the funds be spent. Because this Court lacks the authority to follow the dissenting, rather than the majority, opinion in *Dole*, the University's "relatedness" objection must be rejected.

In any case, Section 504's nondiscrimination requirement is at least as directly related to the purposes of federal funding as was the condition approved

in *Dole*.[15] Section 504 furthers the federal interest in assuring that no federal funds are used to support, directly or indirectly, programs that discriminate or otherwise deny benefits and services on the basis of disability to qualified persons. The statute's nondiscrimination requirement is patterned on Title VI and Title IX, which prohibit race and sex discrimination by "programs" that receive federal funds. See *NCAA* v. *Smith*, 525 U.S. 459, 466 n.3 (1999); *Arline*, 480 U.S. at 278 n.2. As noted above, both Title VI and Title IX have been upheld as valid Spending Clause legislation. See *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Grove City Coll.* v. *Bell*, 465 U.S. 555 (1984). In upholding these statutes, the Court established that Congress has a legitimate interest in preventing the use of any of its funds to "encourage[], entrench[], subsidize[], or result[] in," *Lau*, 414 U.S. at

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[15] In fact, the University's argument fails even under the *Dole* dissent's view of the "relatedness" requirement. Section 504 does not require that a "State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship" to federal funding. 483 U.S. at 215 (O'Connor, J., dissenting). Instead, Section 504 simply prohibits discrimination within the program or agency receiving the federal funds and, as such, "specifies in some way how the money should be spent." *Id*. at 216 (citation omitted). In particular, Section 504 directs that federal funds not be used to subsidize agencies the benefit of whose programs are denied to individuals with disabilities. Justice O'Connor agreed that "[w]hen Congress appropriates money to build a highway, it is entitled to insist that the highway be a safe one." *Id*. at 215. Similarly, when Congress appropriates money to provide educational services to American students, it is entitled to insist that the educational opportunity provided be an open one, available to all students regardless of disability.

569, discrimination Congress views incompatible with spending for the "general Welfare," such as discrimination on the basis of race, gender, and disability.

The University contends (Br. 39-40) that Section 504 nonetheless fails the "relatedness" requirement (at least under Justice O'Connor's *Dole* dissent) because it applies to all the operations of the University instead of just the university functions directly receiving federal funds.[16] But prohibiting discrimination in all the operations of an agency receiving federal funding bears "some relationship" to the congressional purpose of ensuring that federal funds do not subsidize discriminatory agencies and its interest in ensuring that the benefits created by the federal funds are available to all, regardless of disability. See *Lovell* v. *Chandler*, 303 F.3d 1039, 1051-1052 (9th Cir. 2002), petition for cert. pending, No. 02-545; *Koslow*, 302 F.3d at 175-176. In defining the term "program or activity" to include all the operations of a department that receives

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[16] Even if this view were correct, the University has not alleged, much less shown, that the university functions at issue in this case do not receive federal funds. In *West Virginia*, this Court made clear that in making a facial challenge to a Spending Clause statute, the State "has a very heavy burden to carry, and must show that the [statute] cannot operate constitutionally under any circumstance." 289 F.3d at 292. Because the University concedes (Br. 40) that Section 504 complies with the "relatedness" requirement in at least some cases, its facial challenge must fail. *Ibid*. And because the University has not even undertaken to show that Section 504's restrictions fail the "relatedness" limitation as applied to this case, any as-applied challenge must fail as well.

any federal funds, Congress elected to rely on an existing state organizational framework in determining the proper breadth of coverage. State law establishes which programs are placed in which departments, and Congress could reasonably have presumed that States normally place related programs with overlapping goals, constituencies, and resources in the same department. Congress could also reasonably conclude that, as a practical matter, a federal grant to any part of such an agency confers a benefit to all aspects of the agency's operations. See *Grove City*, 465 U.S. at 572 (federal assistance "has economic ripple effects throughout the aided institution" that would be "difficult, if not impossible" to trace); *Hoxworth* v. *Blinder, Robinson & Co.,* 903 F.2d 186, 195 (3d Cir. 1990) ("Legally as well as economically, money is fungible."). Even if it were possible to track how the University spent each particular dollar of federal assistance, and distinguish it from money obtained from other sources, the federal funds free other resources to be used by the University for other purposes. See *United States* v. *Grossi*, 143 F.3d 348, 350 (7th Cir.), cert. denied, 525 U.S. 879 (1998). The availability of those funds for other purposes within the same agency is a direct, tangible benefit of federal funding. Congress may reasonably require that all students, regardless of disability, enjoy this secondary benefit of the federal funding as well.

CONCLUSION

The Eleventh Amendment was no bar to the district court's jurisdiction over this action.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The validity of Section 504's waiver requirement is at issue in *Biggs* v. *Board of Educ. of Cecile Co.*, No. 02-1318, currently pending before this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that the brief complies with the type-volume limitations set out in Fed. R. App. P. 32(a)(7)(B). The brief is proportionately spaced, has a typeface of 14 points, was prepared using WordPerfect 9.0, and contains 7,834 words.

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CERTIFICATE OF SERVICE

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